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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ALBERTO MARQUEZ,

Defendant and Appellant.

D068672

(Super. Ct. No. SCD257193)

APPEAL from a judgment of the Superior Court of San Diego County, Leo Valentine, Jr., Judge. Affirmed.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Jennifer B. Truong, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury convicted Luis Marquez of attempted robbery (Pen. Code,¹ §§ 211, 664) and robbery (§ 211). As to the robbery conviction, the jury found true an allegation the property taken exceeded \$65,000 (§ 12022.6, subd. (a)(1)). The court denied probation and sentenced Marquez to an aggregate term of four years and eight months in prison.

Marquez appeals, contending we must reverse the judgment because the court erred in denying his motion to suppress evidence of his confession, which he claims was the involuntary product of improper promises of leniency. Alternatively, he contends the court abused its discretion by denying him probation. He contends there is insufficient evidence to establish his culpability for the attempted robbery charge. We are unpersuaded by these contentions and affirm the judgment.

II

BACKGROUND

A

Two armored truck couriers drove to a home improvement store and stopped in the back. One of the couriers, who was armed, got out of the truck, went into the store, picked up a deposit containing cash and checks, and placed it in a tote bag. As the courier was returning to the armored truck, Marquez's brother came out from behind a truck and walked toward the courier. Marquez's brother wore a women's stocking over

¹ Further statutory references are to the Penal Code unless otherwise stated.

his face and pointed a gun at the courier's head and upper body. He yelled in a voice loud enough to be heard by anyone in the area, "Don't make me shoot you. Don't make me shoot you."

The courier had his hand on his own gun, but dropped it back into its holster after he concluded Marquez's brother's gun was plastic. When Marquez's brother got within three to four feet of the courier, the courier grabbed the arm Marquez's brother was using to hold the gun and pulled Marquez's brother toward him. Marquez's brother tried to grab the courier's tote bag, but he could not get away from the courier.

When the driver of the armored truck saw the struggle, he activated a siren. Marquez suddenly appeared from behind the truck and the driver of the truck drew his weapon and pointed it at Marquez. Marquez tried to pull his brother away from the courier while his brother was still gripping the courier's tote bag. The three men struggled for approximately 35 to 40 seconds until the courier could no longer hold on to Marquez's brother and let go. Marquez and his brother ran toward a nearby apartment complex and disappeared, leaving behind Marquez's brother's gun and a backpack Marquez had brought to hold the money.

The gun turned out to be a pellet gun with a carbon dioxide canister inside. Marquez's brother matched the predominant profile in a DNA mixture found on the gun, and he was a possible major contributor to a low level DNA mixture found on the gun's carbon dioxide canister. Both Marquez and his brother were possible major contributors to a mixture of DNA found on the backpack.

B

Approximately two months later, two other armored truck couriers went to a shopping mall to pick up deposits from some of the stores. After completing a pick up from a store on the second floor, one of the couriers started to walk down a set of stairs to return to the armored truck. As he was walking down the stairs, Marquez came from behind him and stunned his face with a stun gun. The courier fell to the ground and dropped his bag, which contained more than \$75,000. Marquez continued holding the stun gun to the courier's face as Marquez's brother grabbed the bag. Marquez and his brother then ran up the stairs toward a parking structure. Mall surveillance cameras captured them running with the courier's bag to a truck with no license plates. That day and the next day, with assistance from mall security and a mall employee, police recovered the courier's bag as well as some of the individual store deposit bags and a scanner that had been in the courier's bag.

Marquez's fingerprints were on three of the deposit bags and his DNA matched DNA found on one of them. In addition, police found a stun gun in Marquez's bedroom and Marquez was a possible major contributor to a DNA mixture found on it. Police also found containers of gun pellets and carbon dioxide cartridges in Marquez's bedroom. His fingerprints were on the cartridges.

Police traced the truck Marquez and his brother used to commit the mall robbery back to the person who loaned it to them. According to the person, who testified under a grant of immunity, Marquez's brother paid him \$1,000 to use the truck, purportedly to pick up cocaine.

Approximately two months after the mall robbery, police arrested Marquez at the airport. He was carrying \$6,746 with him. A search of his cell phone revealed photos taken at the mall a few weeks before the robbery. His phone also contained an e-mail sent a week before the robbery showing he had purchased a stun gun.

In an interview with police, Marquez confessed to committing the attempted robbery of the home improvement store and the robbery of the mall. As for the attempted robbery, Marguez stated he noticed the armored truck regularly picking up money from the home improvement store, and he and his brother decided to rob it. They went to an apartment complex near the home improvement store and watched the truck. He brought a backpack to collect the money, and his brother brought a pellet gun. While he acted as the lookout, his brother approached the courier and tried to take the money. Although he got "cold feet," he intervened to pull his brother away when the courier held his brother. They ran away, leaving behind the gun and the backpack.

As for the mall robbery, Marquez stated he observed the armored truck couriers at the mall on more than one occasion. The couriers picked up money at approximately the same time on each occasion. There was one courier who did not hold his bag as securely as the other courier. On the day of the robbery, Marquez and his brother went to the mall. Marquez saw the courier and watched him as he entered stores to collect deposit bags. Marquez and his brother hid near the stairs leading to the armored truck. When the

courier came down the stairs, Marquez stunned him, he fell to the ground, and Marquez's brother took his bag from him. They then ran to their truck, emptied out the store deposit bags, and tossed the bags out the window as they drove away. They gave the person who loaned them the truck \$1,000, Marquez kept \$25,000 or \$26,000, and his brother kept the remainder.

III

DISCUSSION

A

1

a

Marquez's police interview lasted between two and three hours. The interview began with some small talk followed by lengthy remarks from the interviewing detective imploring Marquez to talk freely and truthfully and to accept responsibility for his actions. The detective then provided Marquez with the admonitions required by *Miranda v. Arizona* (1966) 384 U.S. 436. After Marquez acknowledged understanding the admonitions, he agreed to answer the detective's questions.

The detective first asked him some questions about his employment history and the source of the money found on him when he was arrested. The detective then asked him about various area malls. When he denied any familiarity with the mall where the robbery occurred, the detective again implored him to tell the truth. The detective told him it was not right for him to steal money to finance the lifestyle he wanted; he had to

earn it. The detective also told him he was about to learn a difficult lesson and he was going have to pay for what he did by going to jail.

After asking him whether he felt bad about spending the money, the detective once more implored him to tell the truth:

"[DETECTIVE]: [T]his is the part where people are gonna see whether you're telling the truth or not. If someone tells the truth on something, are they remorseful? If they tell the truth, isn't it safe to say that other people will find them remorseful and sorry for what they did? ... If someone did something wrong and they came forward and told the truth and said I was sorry, are you more apt to believe they're sorry or the person that lied about it and lied about it and lied about it and then the person accusing them comes out and says ... here's the proof. You did it and then prove it and then you say okay, you got me. I'm sorry. Now which one are you going to believe is more remorseful?"

The detective continued with this same theme:

"[DETECTIVE]: Okay, now your parents—let's say you break a window or something like that, right? [¶] . . . [¶] And the neighbor sees you break the window, but you run home and, and you tell mom and dad, you say listen, I broke this window. I'm sorry. It was an accident. Blah, blah, blah, blah. Now [are] your parents more apt to be easier on you that way? You probably might be in a little bit of trouble, fix the window, pay for the window—whatever—or you don't go home, the neighbor goes [to] your parents. Says hey, [Marquez] broke my window. You come home, hey, [Marquez], you broke the window. No, I didn't break the window. I didn't break the window. I don't know what you're talking about. I was down the street with my friend. I didn't break the

window. And then all of a sudden they say hey, here's [the neighbor] over here. He saw you break his window. Okay, I'm sorry. Which one are you gonna get more in trouble for?

"[MARQUEZ]: The one that had it covered.

"[DETECTIVE]: So remorse is probably a good thing, don't you think? Don't you think telling the truth about something is better than lying about it in the end? Especially for people that have control over your life that can punish you? Don't you think it's better for them to see that you have remorse? Don't you think that's probably better for that person? It kinda helps them out in the decisions that they're gonna make about your life, don't you think?

"[MARQUEZ]: Yeah.

"[DETECTIVE]: Okay, I'm really giving you a chance to now come clean and tell us the truth about everything without me proving it to you. Now I will prove it to you and I'll show you the evidence we have against you—at the end—but if you keep on trying to skirt around it and say you didn't do it, I'm gonna pull it all out and then you've lost the opportunity to be remorseful. You will have then lost the ability to look sorry for what you did. Now it's gonna look like well, [the detective] spelled it out for you. That's the only reason you said you're sorry. You know, you're sorry now. You're not really sorry. You're only sorry because [the detective] proved it to you. So before I prove it to you, don't you think you wanna take the chance to be sorry about it before I prove you did it? Because after I prove you did it, you've lost the opportunity to say sorry.

... [Y]ou're that kind of guy that wants to say sorry, don't ya? Aren't you?"

The detective continued making similar remarks, which spanned two transcript pages and culminated as follows:

"[DETECTIVE]: Would you like to feel better about yourself? May I help you with that? May I help you with that? May I help you with that? Okay, look at me. All right, let's do this, okay? Okay? Let's do this. Okay, tell me what happened. Where did it happen? Where did it happen? Just say it, which one? Just say it, it's okay. Which one[?]"

After these remarks, Marquez confessed to committing the mall robbery and the attempted robbery of the home improvement store with his brother.

b

Before trial, Marquez moved to suppress evidence of his confession in part on the ground it was the involuntary product of improper promises of leniency. After reviewing a recording of the police interview and hearing the parties' arguments, the court denied the motion, finding the confession was not involuntary because police had not actually promised Marquez anything and Marquez's free will had not been overborne during the interview.

2

Marquez contends we must reverse the judgment because the court erred in denying his suppression motion. We disagree.

" 'An involuntary confession is inadmissible under the due process clauses of both the Fourteenth Amendment to the federal Constitution [citation] as well as article I, sections 7 and 15 of the California Constitution [citation].' [Citation.] 'Under both state

and federal law, courts apply a "totality of circumstances" test to determine the voluntariness of a confession.' [Citation.] '[C]oercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment.' [Citation.] '[T]he question in each case is whether the defendant's will was overborne at the time he confessed. [Citations.] If so, the confession cannot be deemed "the product of a rational intellect and a free will." ' [Citation.] The burden is on the prosecution to show by a preponderance of the evidence that the statement was voluntary. [Citation] 'When, as here, the interview was [recorded], the facts surrounding the giving of the statement are undisputed, and the appellate court may independently review the trial court's determination of voluntariness.' " (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1400-1401.)

"In evaluating the voluntariness of a statement, no single factor is dispositive. [Citation.] The question is whether the statement is the product of an ' "essentially free and unconstrained choice" ' or whether the defendant's ' "will has been overborne and his capacity for self-determination critically impaired" ' by coercion. [Citation.] Relevant considerations are ' "the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health." ' " (*People v. Williams* (2010) 49 Cal.4th 405, 436.)

" 'In assessing allegedly coercive police tactics, "[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." ' " (*People v.*

Williams, supra, 49 Cal.4th at p. 436.) "It is well settled that law enforcement may confront a witness with what they know. [Citation.] They may also discuss any advantages that ' "naturally accrue" ' from making a truthful statement. [Citations.] They may explain the possible consequences of the failure to cooperate as long as their explanation does not amount to a threat contingent upon the witness changing her story. [Citations.] They may even engage in deception as long as it is not of a type 'reasonably likely to produce an untrue statement.' " (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 79.)

In this case, the interviewing detective suggested Marquez would benefit by telling the truth because he would feel better about himself and demonstrate remorse to those responsible for determining what consequences he would face for his actions. "[W]hen law enforcement officers describe the moral or psychological advantages to the accused of telling the truth, no implication of leniency or favorable treatment at the hands of the authorities arises." (*People v. Carrington* (2009) 47 Cal.4th 145, 172.) Likewise, "[m]ere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise ... does not ... make a subsequent confession involuntary." (*People v. Dowdell, supra*, 227 Cal.App.4th at p. 1401.) As the California Supreme Court concluded in *People v. Holloway* (2004) 33 Cal.4th 96, suggestions a defendant might benefit in an unspecified manner from giving a truthful account do not cross the fine line between permissibly "factually outlining the benefits that may flow from confessing" and impermissibly "impliedly promising lenient

treatment in exchange for a confession." (*Id.* at pp. 117, 115.) Accordingly, we conclude Marquez has not established the court erred by denying his suppression motion.

B

1

Although Marquez was eligible for a grant of probation for his crimes, the probation officer's report recommended the court deny probation and sentence Marquez to the maximum possible term of six years and eight months in prison. The report identified two circumstances supporting a grant of probation and five circumstances supporting a denial of probation. The circumstances supporting a grant of probation were Marquez's expression of willingness to comply with the terms of probation and his expression of remorse during the probation interview. (Cal. Rules of Court, rule 4.414(b)(3) & (b)(7).) The circumstances supporting a denial of probation were the use of weapons during the commission of the crimes, the substantial monetary loss in the robbery crime, Marquez's active participation in the crimes, the sophisticated manner in which Marquez committed the crimes, and Marquez's prior poor performance on summary probation for other offenses. (*Id.*, rule 4.414(a)(2), (a)(5), (a)(6), (a)(8) & (b)(2).) The prosecution filed a sentencing statement agreeing with the probation report and recommendation.

Marquez countered with a statement in mitigation. In the statement, he requested the court stay a prison sentence and allow him to prove himself on probation. As support for this request, he identified 17 mitigating factors, including his youth and lack of sophistication, his lack of a prior felony record, his willingness and ability to comply with

any conditions of probation, his remorse for his crimes, his family support, and his incentive under recidivism statutes to remaining law-abiding. (Cal. Rules of Court, rules 4.414(a)(8), (b)(1), (b)(3), (b)(4), (b)(7), (b)(8).)

At the sentencing hearing, the court stated it had read and considered the probation report, Marquez's statement in mitigation and letters of support, the prosecution's sentencing statement, and a diagnostic report from the Department of Corrections and Rehabilitation (§ 1203.03). After hearing the parties' arguments and acknowledging Marquez's youth, family support and capacity for rehabilitation, the court decided to deny Marquez probation and sentenced him to state prison. In reaching its decision, the court noted it had considered the totality of the circumstances, but its primary concern was public safety. On that point, the court pointed out Marquez had a prior juvenile adjudication for transporting 33 pounds of marijuana across the border for which he received rehabilitation services.

The court then turned to the attempted robbery of the home improvement store, stating, "Quite frankly, Mr. Marquez, you and your brother are very fortunate you're still alive. You're very fortunate that you picked an individual that had some experience that was not apt to try to take anyone else's life. Because he had his hand on his gun. He said he had pulled it out, which means that your brother probably would have gotten killed had he really believed that firearm was real. [¶] Fortunately, he was trained enough that he made the distinction and decided that he didn't need to use force. But that is a second chance. You've asked me to give you a second chance. That was a second chance."

The court next turned to the mall robbery, stating, "About a month or so later you folks decide to do this again. I'm not sure why.... [¶] . . . [¶] But the fact that you prepared—got yourself a stun gun, surveilled the location, and then went and committed this and took \$75,000 from this company.... [¶] . . . [¶] ... I thought about it. I thought about you as a young man and the lessons that you should have learned from the first time that you were able to go home with your brother without either of you being hurt.

"So then the question becomes if I cut Mr. Marquez a break and give him probation, he's got two strikes and take that leniency and walks out in the community commits another felony, he's looking at 25 years to life. 25 years to life. [¶] And I would like to think that that is enough, Mr. Marquez. Just the idea that you could do 25 years to life is enough to make you stop and think before you do this again. [¶] . . . [¶]

"And so as it relates to you, Mr. Marquez, if this was a one-time incident, the first time ... then I would not have to struggle with whether or not to give probation. I think based upon what I've seen, I'd grant you probation.

"But the fact that you turned around and repeated this within the next 30 days suggests, Mr. Marquez, I'm not sure that anything other than being locked up and being remorseful for that that you would not find yourself back before the Court. I'm not satisfied of that because I'm not sure who talked who into doing what. And [it] takes a lot of courage to do what it is you did Mr. Marquez. And if you had that much courage, then I'm not prepared to put the community at risk and send you home today."

Marquez contends the court erred in denying him probation because the totality of circumstances, including his age and lack of sophistication, warranted a grant of probation. We review an order to grant or deny probation for abuse of discretion. (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1091.) Under this standard, we presume the court acted correctly unless it is clearly shown the court's sentencing choice was arbitrary or capricious, or exceeded the bounds of reason. (*People v. Hubbell* (1980) 108 Cal.App.3d 253, 260; *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.)

Here, the record shows the court carefully considered whether to grant or deny Marquez probation given the totality of the facts relating to his crimes and to him personally. The court ultimately determined Marquez would likely be a danger to others if he was not imprisoned. The court properly considered this fact. (Cal. Rules of Court, rule 4.414(b)(8).)

Moreover, the record amply supports the court's determination. Neither the rehabilitation services Marquez received as a juvenile nor his narrow escape from serious injury or death during the attempted robbery at the home improvement store deterred him from planning and executing the mall robbery. The court, therefore, could have reasonably found it necessary for him to experience the consequence of a prison commitment to protect society and deter him from committing future crimes. As the record does not show the court's decision to deny probation was arbitrary, irrational or beyond the bounds of reason, Marquez has not established the court abused its discretion by denying him probation.

C

Lastly, Marquez contends we must reverse his attempted robbery conviction because there was insufficient evidence to establish he aided and abetted his brother in committing this crime. " '[W]hen a defendant challenges the sufficiency of the evidence, " '[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" [Citations.] "Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.]" [Citation.] We " ' "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' ' ' ' " (*People v. Lopez* (2013) 56 Cal.4th 1028, 1069, abrogated on another point by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

A person is liable for a crime as an aider and abettor if the person acts "with 'knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and ... conduct by the aider and abettor ... assists the achievement of the crime.' " (*People v. Lopez, supra*, 56 Cal.4th at p. 1069; *People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) "[I]n general neither presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission. [Citations.] However, '[a]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime,

companionship, and conduct before and after the offense.' " (*People v. Campbell*, at p. 409.)

Here, the evidence showed Marquez remained positioned behind the armored truck as his brother attempted to rob the courier until the courier resisted his brother and tried to apprehend him. At that point, Marquez immediately came to his brother's aid and worked on freeing his brother from the courier's grasp while his brother continued trying to take the courier's bag from the courier. Once the courier released his brother, they fled together, leaving behind his backpack and his brother's gun.

A jury could reasonably infer from this evidence Marquez knew his brother was attempting to rob the courier and intended to help his brother by acting as a lookout and by interfering with the courier's efforts to apprehend his brother. This inference is, of course, fully supported by the evidence of Marquez's confession, which we previously determined the court properly admitted. (See part III.A, *ante*.) Accordingly, we concluded Marquez has failed to establish there was insufficient evidence to support his attempted robbery conviction.

IV
DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

HUFFMAN, J.